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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1906.

NO. 253.

R. G. STONE, R. M. FINLEY AND NANNIE E. FINLEY,
Plaintiffs in Error.

vs.

SOUTHERN ILLINOIS AND MISSOURI BRIDGE COMPANY,
Defendant in Error.

In Error to the Supreme Court of the State of Missouri.

BRIEF FOR DEFENDANT IN ERROR.

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St. Louis Law Printing Co., 311-315 Locust. Bell, Main 1819; Kinloch, Central 986 L.

(20,196)

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STATEMENT FOR DEFENDANT IN ERROR.

This writ of error submits for review a judgment of the Supreme Court of Missouri in a condemnation suit brought by the Southern Illinois & Missouri Bridge Company, a corporation organized under the laws of

Illinois, defendant in error, against R. G. Stone and others, plaintiffs in error, in the Circuit Court of Scott County, Missouri, April 24th, 1902.

The petition for the appointment of commissioners to assess the value of the land sought to be taken, filed by the Bridge Company, contains, among others, the following allegations:

> "That the said bridge is intended as a railroad bridge, and that it is necessary for the plaintiff (Southern Illinois & Missouri Bridge Company) to have a right-of-way for its railway tracks, bridges and terminal yards; that for the purpose of carrying out its charter privileges, it is necessary for it to hold and to own the following described tract of land, lying and being in the County of Scott in the State of Missouri, to-wit": (here follows description) "containing twenty and three-tenths (20.3) acres; that said real estate is necessary for the laying of tracks and the handling of business over and across plaintiff's bridge" (Transcript of Record, pp. 5 and 6).

The petition concludes with a prayer for the appointment of three freeholders as commissioners to assess the damages which defendants may sustain in consequence of the establishment, erection and maintenance of said road and approaches over and through the premises, and for all proper orders.

Section 1352, Revised Statutes of Missouri, 1899, provides that

> "in case it may become necessary for any bridge corporation heretofore organized, or that may be hereafter organized, under Section 1351, to take or appropriate any lands of persons or corporations for approaches, road, foot or wagonways of such

bridge corporation, and the owners of said property can not agree with said corporation upon proper compensation to be paid * * * , then the said property may be taken by said bridge corporation in the same manner that is provided for by law in relation to the appropriation and valuation of lands taken for telegraph * * * and railroad purposes."

The provision for condemning land for the latter purposes is

Section 1264, Revised Statutes of Missouri, 1899, which is as follows:

"In case lands or other property are sought to be appropriated by any road, railroad, telephone, telegraph or other corporation created under the laws of this State for public use, and such corporation and the owners can not agree upon the proper compensation to be paid * * * such corporation may apply to the Circuit Court of the county where said land, or any part thereof, lies, or the Judge thereof in vacation, by petition, setting forth the general directions in which it is desired to construct their road, railroad, telephone or telegraph line over such lands, a description of the real estate or other property which the company seeks to acquire, the names of the owners thereof * * * ."

The section further provides that it shall not be necessary to make any person party defendant unless he is in actual possession of the premises, claiming title,

"or has a title to the premises appearing of record upon the proper records of the county",

and that the petition shall also pray

"the appointment of three disinterested freeholders as commissioners, or by a jury, to assess

> the damages which such owners may severally sustain in consequence of the establishment, erection and maintenance of such road, railroad, telephone or telegraph line over said land * * * ."

Section 1265, Revised Statutes of Missouri, 1899, provides that

> "upon the filing of the petition, a summons shall be issued, giving such owner at least ten days' notice of the time when said petition will be heard * * * ."

Section 1266, Revised Statutes of Missouri, 1899, provides:

> "The Court, or Judge thereof in vacation, on being satisfied that due notice of the pendency of the petition has been given, shall appoint three disinterested commissioners, who shall be freeholders, resident of the county in which the real estate, or a part thereof is situated, to assess the damages which the owners may severally sustain by reason of such appropriation, who, after having viewed the property, shall forthwith return, under oath, such assessment of damages to the clerk of such Court * * * together with a specific description of the property on which such damages are assessed * * * and, thereupon, such company shall pay to said clerk the amount thus assessed for the party in whose favor such damages have been assessed, and, on making such payment, it shall be lawful for such company to hold the interest in the property so appropriated for the uses aforesaid * * * ."

Section 1268, Revised Statutes of Missouri, 1899, provides:

"Upon the filing of such report of said commissioners the clerk of the Court wherein the same is filed, shall duly notify the party whose property is affected by the filing thereof, and the report of said commissioners may be reviewed by the Court in which the proceedings are had, on written exceptions filed by either party in the clerk's office within ten days after the service of the notice aforesaid, and the Court shall make such order therein as right and justice may require, and may order a new appraisement upon good cause shown. Such new appraisement shall, at the request of either party, be made by a jury, under the supervision of the Court, as in ordinary cases of inquiry of damages; but, notwithstanding such exceptions, such company may proceed to erect said telephone or telegraph line or construct said road or railroad, and any subsequent proceedings shall only affect the amount of compensation to be allowed."

On the 12th day of May, 1902, the defendants in said suit filed their answer in the Circuit Court of Dunklin County, to which the cause had been removed by change of venue (Transcript of Record, p. 8), said answer containing first, an averment that no summons or notice had ever been issued and served upon the defendants in the manner required by law.

The second, third and fourth averments are as follows:

"**Second.** It appears from the face of plaintiff's pretended petition, that the plaintiff is a corporation incorporated under the laws of the State of Illinois for the purpose of constructing and maintaining and operating a bridge across the Mississippi River, and these defendants say such a corporation, incorporated under the laws of another

State, for such a purpose, has no right, power or authority, under the Constitution and laws of Missouri, to condemn property of any kind, situated in the State of Missouri, for any use, public or private.

"**Third.** It does not appear by said pretended petition that plaintiff has received any authority from the Congress of the United States or erect a bridge across the Mississippi River.

"**Fourth.** It does not appear by said pretended petition that plaintiff has any right or authority to do business in the State of Missouri, there being no allegations anywhere in said pretended petition showing compliance by it with Sections 1014, 1015, 1016, 1017, 1024, 1025, 1026 and 1027, Article I, Chapter 12 of the Revised Statutes of Missouri, 1899."

The fifth averment states that it does not appear by said "pretended petition" that the plaintiff has surveyed or located the ground over which it "pretends" to have the right to build railway tracks, etc., or that it has filed any profile map of its survey.

The sixth averment is as follows:

"**Sixth.** The plaintiff has no right, power or authority, under the law, to condemn a strip of land 200 feet wide, for a right-of-way for railroad purposes, or for any other purpose."

The seventh states that the defendants, prior to the time of the issuing of the notice or summons, had sold and conveyed the land described to certain persons named, to-wit, J. H. Crowder, L. B. Houck and Giboney Houck, and that the deed had been duly filed for record prior to the institution of plaintiff's suit, and, further, that, prior to the execution of the deed,

"they had entered into a contract with the said grantees in said deed for the sale and conveyance of said real estate to grantees, and that said deed was executed and delivered in pursuance of such contract for the sale of said land",

and that plaintiff had notice long before the beginning of this suit of the existence of the contract, and of the fact that the defendants had sold the property. Defendants then disclaim the ownership of the real estate in suit.

In the eighth averment the defendants state that, prior to the issuing of the summons, the

"Cape Girardeau & Thebes Bridge Terminal Railroad Company, a corporation organized under the laws of the State of Missouri, for the purpose of constructing and maintaining a railroad in Scott County, Missouri, from Fremsdorf Station, on Houck's Missouri & Arkansas Railroad, to the Mississippi River, had bought and acquired, and appropriated to the public use, and for the purpose for which it was incorporated, the property described in the said pretended petition".

The ninth averment is as follows:

"**Ninth.** Defendants further state that the plaintiff, which is a corporation under the laws of Illinois, has no right to construct and operate a railroad, nor to engage in the railroad business, in the State of Missouri, because such business is not expressly authorized in its charter or by any law of this State under which said corporation may come; and this proceeding by it to condemn property for the building of a railroad and its engaging in the railroad business in this State violates the plain provisions

of Section 1024 of the Revised Statutes of Missouri, 1899, and Section 7 of Article XII of the Constitution of Missouri."

The tenth repeats the averments in regard to the sale of the property to the Cape Girardeau & Thebes Bridge Terminal Railroad Company.

The eleventh contains an averment that a suit has been instituted in the Circuit Court of Scott County by the Cape Girardeau & Thebes Bridge Terminal Railroad Company against the Southern Illinois and Missouri Bridge Company, to enjoin the latter company from intering with said property, etc.

On the 14th of May, 1902, the cause coming on for hearing on the petition of plaintiff for the appointment of commissioners, and the answer filed by defendants, the plaintiff Bridge Company, which was incorporated under the laws of Illinois on the 6th of December, 1900, introduced an Act of Congress, dated January 26th, 1901, authorizing the said Bridge Company to construct a bridge across the Mississippi River at or near Gray's Point (T. of R., p. 84); also petition of Myron J. Carpenter and others to James A. Rose, Secretary of State of Illinois, for leave to form a corporation under an Act of the General Assembly of Illinois, entitled "An Act Concerning Corporations, approved April 18, 1872",

> "to erect, construct, maintain and operate a bridge and approaches thereto over the Mississippi River from a point on the east bank of the Mississippi River in the County of Alexander and State of Illinois to a point opposite thereto in the State of Missouri * * * " (Tr. of R., p. 89);

also certificate dated March 29th, 1902, of Sam B. Cook, Secretary of State of Missouri, which, among other things, recites

> "I * * * do hereby certify that said Southern Illinois & Missouri Bridge Company is, from the date hereof, duly authorized and licensed to do business in the State of Missouri for a term ending December 28th, 1950, and is entitled to all the rights and privileges granted to foreign corporations * * *" (T. of R., p. 93).

Evidence was offered by the plaintiff in that Court showing the necessity for condemning the land described for its use, its inability to agree with the owners as to the amount of compensation to be paid, and the value of the land sought to be taken, and that defendants were the record owners of said land at the time of the institution of the suit (T. of R., pp. 93–104).

The defendants in that Court offered evidence of the value of the land and other evidence for the purpose of showing that another railroad corporation, organized April 24th, 1902, and named "Cape Girardeau & Thebes Bridge Terminal Railroad Company" was the owner of the land (T. of R., p. 104 *et seq.*).

On the 14th of May, 1902, the Court rendered its judgment in said cause, in which it is recited:

> "The Court further finds that, at the date of the filing of the petition in this suit, the defendants were the record owners of the property in question, and the Court further finds that the plaintiff has no right to exercise the power of eminent domain and can not acquire the land described in its petition by proceeding to condemn the same" (T. of R., p. 11).

From this judgment plaintiff Bridge Company prosecuted its appeal to the Supreme Court of the State, and, on the hearing of such appeal, the judgment of Dunklin County Circuit Court was in all things reversed, the Court holding, first, that property taken for toll bridges and ferries is for a public use; that plaintiff, a foreign Bridge Company, has all the powers of a domestic corporation and may exercise the right of eminent domain, by virtue of

Section 1024, Revised Statutes of Missouri, 1899, which provides that corporations of other States

> "shall be subjected to all the liabilities and restrictions and duties which are, or may be, imposed upon corporations of like character organized under the general laws of this State, and shall have no other or greater powers",

upon their filing in the office of the Secretary of State their charter or articles of incorporation and paying certain fees.

The cause was remanded, with directions to said Circuit Court to appoint three disinterested commissioners to assess the damages which the defendants would sustain by the appropriation of said strip of land.

The opinion of the Supreme Court on that appeal is found in

Volume 174, Missouri Reports, page 1.

It appears from the opinion that all the questions then before the Court were considered and passed upon by it adversely to defendants' contention.

The cause was remanded, as we have seen, for the sole purpose of enabling the court below to ascertain, according to the forms of law, the amount of compensation which should be paid by the Bridge Company for the tract of land it was seeking to condemn.

Upon the reception of the mandate, the Judge of the Circuit Court, in obedience to its direction, appointed three commissioners to view the land and assess the damages the owners would sustain by the taking of it.

The commissioners, in due time, made their report, assessing the damages at $8,120.00, which amount the plaintiff Bridge Company at once deposited with the clerk of the Court for the use of the defendants in that Court.

To this report, exceptions were filed by the defendants, which exceptions can be found in the

Transcript of Record, pp. 12, 13, 14, 15 and 16.

We quote exceptions 1 and 8, which we believe to be representative of the other exceptions:

> "**First.** And in explanation of this exception, defendants state that plaintiff, by virtue of an Act of Congress, approved January 26th, 1900, was only authorized to build a bridge over the Mississippi River, including approaches at either end thereof, extending across the river from bluff to bluff, and for the information of the Court defendants state that the plans and specifications prepared by the engineers of plaintiff were only approved by the Secretary of War to the extent of confining said approaches within the river bluffs on either side of the river, thereby fixing the length of the approach to said bridge on the Missouri side of said river at seven hundred and twenty (720) feet; and, therefore, defendants except to the order appointing commissioners to view and assess the damage done to their property, except the strip of seven hundred and twenty (720) feet, by two hundred (200) feet wide, extending from the water's edge to the bluff on the west side of the river, which said strip constitutes the western approach to said bridge;

and they charge that that part of said order that seeks to condemn a strip two hundred feet wide from the bluff west over defendants' land is void, for the reason that neither the Act of Congress nor the charter of plaintiff authorizes it to condemn property for any purpose, except for the purpose of an approach to its bridge."

"**Eighth.** Defendants further state by way of objection and exception that plaintiff is a corporation incorporated under the laws of the State of Illinois for the purpose of constructing, maintaining and operating a bridge and approaches thereto over the Mississippi River from a point on the east bank of said river, in the County of Alexander, in the State of Illinois, to a point opposite thereto in the State of Missouri, for the passage of railway trains, and at the option of said corporation for the passage of wagons and vehicles of all kinds, for the transit of animals and foot passengers for such reasonable tolls as may be approved from time to time by the Secretary of War, and defendants further say that such corporation, incorporated under the laws of a foreign State for such purpose aforesaid, although permitted by an act of Congress to erect and maintain such bridge and approaches, yet has no right or power under the Constitution and laws of the State of Missouri, and under the Constitution of the United States or any act of Congress, to condemn any property situated in the State of Missouri to be used by said corporation in constructing, maintaining and operating such bridge and approaches, and that plaintiff had no power by virtue of its charter or the laws of the State of Illinois to condemn property for any purpose, and therefore defendants object and except to the order appointing commissioners and authorizing them to assess damages for the said two-hundred-foot strip to be used for railroad purposes."

These exceptions contain the first reference made in the case to what, by courtesy, may be called a "Federal question".

Defendants also filed an amended answer, which elaborates somewhat the grounds of exception (T. of R., p. 18).

The cause was tried in the Circuit Court, June 30th, 1903, and a verdict rendered for $10,000.00 in favor of said R. G. Stone and others, defendants in that Court, for the damages sustained by them, upon which the Court entered a judgment, reciting that

> "it further appearing to the Court that plaintiff has heretofore paid into Court the sum of $8,120.00 on account of said damages; now, therefore, upon payment by the plaintiff of a further sum of $1,880.00 into Court for the use and benefit of defendants, it is ordered that the easement for the use and purposes of plaintiff, its successors or assigns, for bridge approach, roadways, terminal yards and necessary appurtenances be vested in plaintiff and divested of defendants and their assigns in the real estate hereinbefore in the jury's verdict, which is made a part of this judgment and decree, fully described".

Plaintiff Bridge Company then deposited the further sum of $1,880.00 with the clerk of said Court, thus satisfying said judgment for $10,000.00.

The defendants in that Court then, by proper motion filed, asked an order of Court that the sum of money so deposited with the clerk be paid to the Cape Girardeau & Thebes Bridge Terminal Company, which motion was sustained, and, it is not unfair to assume that the order of the Court was complied with.

From the judgment of the Court, defendants therein appealed to the Supreme Court of Missouri, where the cause was determined in favor of the plaintiff at the October Term, 1905, of that Court.

All the errors which, it was claimed, occurred after the reversal of the cause, were distinctly referred to and carefully considered, except the one upon which plaintiffs in error now place their principal, if not their sole, reliance; that is to say, that the right to condemn the land as an approach to the bridge is limited by the plans, design and drawings of the Bridge Company, approved by the Secretary of War, or that, by reason of the provisions of the Special Act of Congress of January 26th, 1901, authorizing the construction of the bridge, or of the statute of March 3rd, 1899, being section 9 of the River and Harbor Bill of that year, the suit can not be maintained.

The assignments of error are very numerous, but, with due respect to learned counsel, we beg to say they are not as lucid as they might be. We construe them and the brief in their support as asserting—

I.

That the General Statutes of Missouri do not authorize the incorporation of a bridge company to erect a bridge across the Mississippi River—that no company can be organized in this State under said statutes for the erection of bridges over streams which form boundaries between the State of Missouri and another State—that such company can only be organized by special legislation under Section 53, Article IV of the Constitution of Missouri, 1875.

II.

That the law of Missouri does not confer the right of eminent domain on a corporation of another State.

III.

That the law of Illinois does not confer the right of eminent domain upon bridge companies organized in that State, and that the Southern Illinois & Missouri Bridge Company can only exercise in Missouri such powers as are conferred upon it by the State of its creation.

IV.

That the right to commence the erection of the bridge structure was limited to one year from the date of the approval of the Act of Congress of January 26th, 1901, and the Supreme Court of Missouri denied the plaintiffs in error rights accorded to them by said Act of Congress in affirming the judgment of the Circuit Court when the evidence showed that the bridge was not commenced within the period prescribed.

V.

That if the law of Missouri can be interpreted to authorize such bridges, it is unconstitutional, because in conflict with the Federal Constitution and laws which forbid any State from constructing or authorizing the construction of bridges prior to congressional sanction; that such legislation would be violative of

Section 9, Chapter 425, United States Statutes at Large, Vol. 30, p. 1151,

which section is as follows:

"That it shall not be lawful to contruct or commence the construction of any bridge, dam, dike or causeway over or in any port, roadstead, haven, harbor, canal, navigable river, or other navigable water of the United States until the consent of Congress to the building of such structures shall have been obtained and until the plans for the same shall have been submitted to and approved by the Chief of Engineers and by the Secretary of War: *Provided*, That such structures may be built under authority of the legislature of a State across rivers and other waterways the navigable portions of which lie wholly within the limits of a single State, provided the location and plans thereof are submitted to and approved by the Chief of Engineers and by the Secretary of War before construction is commenced: *And provided further*, That when plans for any bridge or other structure have been approved by the Chief of Engineers and by the Secretary of War, it shall not be lawful to deviate from such plans either before or after the completion of the structure unless the modification of said plans has previously been submitted to and received the approval of the Chief of Engineers and of the Secretary of War."

VI.

That the Supreme Court of Missouri erred in holding that any land may be condemned for approaches or terminals by the Bridge Company beyond 720 feet, that being the length of the western approach of the bridge as fixed by the Secretary of War.

We dissent from the several positions assumed by the learned counsel for plaintiffs in error for reasons stated in our

BRIEF OF ARGUMENT.

I.

Plaintiffs in error waived the right to apply for a writ of error.

We beg, first, to advert to the fact that there was no suggestion of a Federal question in this case, no invoking of the Federal Constitution or Acts of Congress, until after a final judgment by the Supreme Court of Missouri, holding that, under the laws of the State, the right to condemn by the Bridge Company existed, and not until after the remandment of the cause with directions which excluded from the consideration of the court below all questions except that relating to the "just compensation" to be paid by the plaintiff to the defendants in that case for the value of the land taken and the damage to the remainder of the tract.

> Southern Illinois & Mo. Bridge Co. v. Stone *et al.*, 174 Mo. 1.

Under the law of the State, the right to condemn is to be determined by the Court before the appointment of commissioners whenever that right is challenged. It is essentially a distinct proceeding and, on the second appeal in this case, the Court, in effect, so held, saying in its opinion:

> "It is claimed by defendants that the petition is fatally defective in that it fails to allege that the land sought to be condemned is to be acquired for public use. But the sufficiency of the petition and all other questions presented by the record on this

appeal, up to the time of the decision of the Court on the former appeal, were passed upon in the opinion then delivered, and have become *res adjudicata*. On the former appeal, the judgment was reversed and the cause remanded with specific directions, as before stated, and under such circumstances the mandate must be strictly pursued, all matters included therein being *res adjudicata* and can not be reopened."

Transcript of Record, p. 190; 194 Mo. 179.

In a like proceeding in a Court of West Virginia, there was a judgment for the condemnation of property on the ground that it was necessary for the petitioner, a bridge company, to take it for the purpose of prosecuting its proposed work, and was not necessary to the defendant, another bridge company, for the exercise of its franchise. A writ of error was allowed, the proceedings of the commissioners stayed and the case taken to the Supreme Court of the State, where the judgment of the lower court was affirmed. To review the latter judgment, the case was brought to this Court, where a motion was made to dismiss the writ of error. This Court said:

"The essential points of contention in the case related to the necessity of the property for the purpose of the petitioner, and to its necessity to the defendant for the proper exercise of its franchise. The judgment for the condemnation was conclusive upon both particulars. A right to condemn, as held by the Supreme Court of the State, is to be determined before the appointment of commissioners to estimate the amount of compensation to be paid.

Baltimore & Ohio Railroad v. Pittsburg, Wheeling, Etc., R. R., 17 West Va. 812.

> If the judgment had been different, all further proceedings would have been ended. Being for the condemnation, the estimate of the compensation, which was to follow, was to be made by commissioners to be appointed, and might, therefore, be treated as being a distinct proceeding. The judgment appears to have been considered by that Court as so far final as to justify an appeal from it, and if the Supreme Court of the State holds the judgment of an inferior Court of the State to be final, we can hardly consider it in any other light in exercising our appellate jurisdiction."
>
> Belmont Bridge v. Wheeling Bridge, 138 U. S., *l. c.* 290.

It is clear from the following paragraph in the opinion of the Supreme Court of Missouri on the last appeal, that that Court was of opinion that a writ of error could have been granted on the judgment entered on the first appeal; the Court said:

> "The plaintiff contends now that if there ever was a Federal question involved in this case, it was involved as much in the former appeal as it is now, and the defendants having failed to take any steps to have these questions reviewed by a Federal tribunal can not now do so, because all of the matters and things therein contained are *res adjudicata*, and under no circumstances can be reopened in the same case. Plaintiff further contends that the only questions open to review on this appeal are those raised on the trial in the Circuit Court on the question of damages, as all the other questions involved were adjudicated on the former appeal" (Transcript of Record, p. 188).

A final judgment in the meaning of
Section 709, United States Compiled Statutes, 1901,

is said to be one which leaves nothing to be judicially determined. Every judicial question in this case which was before the Court was decided on the first appeal.

The ascertainment of the "just compensation" is one committed by the law of the State to three commissioners, and then, to assure to the party who may deem himself aggrieved by the award, "due process of law", to a jury. There seems to be no reason why the remitting of the question of compensation to the inferior court should operate to make the judgment interlocutory so as to prevent the granting of a writ of error by this Court, for, in no circumstances, would this Court review the judgment in that respect.

In construing

Article VII of the Constitution,

which provides that

> "in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of common law",

it has been held that

> "the last clause of the amendment is not restricted in its application to suits at common law tried before juries in the courts of the United States, but that it applies to cases brought to this Court by writs of error from the highest courts of the State".
>
> C. B. & Q. R. R. Co. v. Chicago, 166 U. S. 242.

The only modes known to the common law to re-examine such facts, are the granting of a new trial by the Court where the issue was tried, or to which the record was properly returnable, or the award of the venire *facias de novo* by the appellate court for some error of law which intervened in the proceeding.

C. B. & Q. R. R. Co. v. Chicago, *supra*;
Parsons v. Bedford, 3 Pet. 433;
R. R. Co. v. Fraloff, 100 U. S. 24.

As before stated, it is true that there was no Federal question or, more properly speaking, no semblance of a Federal question in the case when it was first passed on by the Supreme Court, but it was certainly the duty of the parties defendant to present all the defenses they had and not keep in reserve one which enables them to prolong litigation. The cause was not remanded in order that they might present new defenses, but it was sent back to the *nisi prius* court that the only issue not disposed of might be determined.

When a cause is remanded by a superior to an inferior court in Missouri with directions, the latter must conform to such directions; it can exercise no discretion in the way of permitting amendments to pleadings or admit evidence that is not relevant to the particular issue it has been directed to pass on.

It appears from the instructions given and refused that the Circuit Court obeyed the mandate of the Supreme Court in considering no question outside of that which it was directed to consider.

II.

Plaintiffs in error acquiesced in the judgment of the Court declaring the property subject to condemnation.

After the verdict for $10,000.00 in favor of defendants, and before the second appeal to the Supreme Court, they filed a motion for an order requiring the clerk of the court to pay over to the Cape Girardeau & Thebes Bridge Terminal Railroad Company, their grantee, that amount, which had been deposited by the Southern Illinois & Missouri Bridge Company as required by law, which motion was sustained and, doubtless, the money was paid.

Its acceptance did not, of course, affect the defendants' right to an appeal in order that it might have the appellate court to determine whether, in the proceeding, the law had been duly observed, but, it is submitted, that the acceptance of the money was a waiver of any right they had to insist that the property could not be taken from them by this proceeding; that the acceptance of the award was an acquiescence in the right to condemn.

This Court, in a case in which the facts were as follows: A plaintiff in error complained that an assignment of property, not accompanied by delivery or an actual change of possession, was, as to him, fraudulent, and his contention to that effect was denied to him, and he claimed he was denied a right arising under an authority exercised under the United States, said:

> "Whether the State Court so interpreted the territorial statute as to deny such a right to the plaintiff in error, we need not inquire, for it proceeded in part upon another and distinct ground not in-

volving any Federal question, and sufficient in itself to maintain the judgment without reference to that question; that ground is that there was evidence tending to show that the defendants acquiesced in and assented to all that was done and waived any irregularity in the mode in which the assignee conducted the business, and that the question whether the defendants so acquiesced and assented with knowledge of all the facts, and thereby waived their right to treat the assignment as fraudulent, was properly submitted to the jury. The State Court evidently intended to hold that, even if the assignment was originally fraudulent as against creditors * * * it was competent for the plaintiff in error to waive the fraud and treat the assignment as valid for all the purposes specified in it. * * * Whether sound or not, we do not inquire. It is broad enough in itself to support the final judgment without reference to the Federal question."

Beaupre v. Noyes, 138 U. S. 401.

In the case of

Eustis v. Bolles, 150 U. S. 361,

this Court said:

"In its discussion of this question, the Court below cited, and claimed to follow the decision of this Court in the case of

Clay v. Smith, 3 Pet. 411,

where it was held that the plaintiff, by proving his debt and taking a dividend under the bankruptcy laws of Louisiana, waived his right to object that the law did not constitutionally apply to his debt, he being a creditor residing in another State. But, in deciding that it was competent for Eustis to waive his legal rights and that accepting his divi-

dend under the insolvency proceedings was such a waiver, the court below did not decide a Federal question. Whether that view of the case was sound or not, it is not for us to inquire. It is broad enough in itself to support the final judgment withourt reference to the Federal question."

III.

The record does not show that the judgment of the State Court was based on a Federal question.

This Court has held that, where the record shows the judgment of the State court might have been based either upon a law which would raise a question of repugnancy to the Constitution, laws or treaties of the United States, or upon some other independent ground, and it appears that the Court did, in fact, base its judgment on such independent ground and not on the law raising a Federal question, it will not take jurisdiction of the case, even though it may think the decision of the State Courts an unsound one.

Eustis v. Bolles, *supra*.

And, further, it is held that where in any action pending in a State Court, two grounds of defense are interposed, each broad enough to defeat a recovery, and only one of them involves a Federal question, the record must show, in order to justify a writ of error, that the judgment was rested upon the disposition of the Federal question, and if this does not affirmatively appear, the writ of error will be dismissed, unless the defense not involving a Federal question is so palpably unfounded that it can not be presumed to have been entertained by the Supreme Court.

Johnson v. Risk, 137 U. S. 300;
Hale v. Akers, 132 U. S. 554;
Miller's Executors v. Swann, 150 U. S. 132.

IV.

Construction of Act authorizing incorporation of Bridge Companies in Missouri, showing that it applies to the Mississippi River.

It is claimed that the statute authorizing the formation of bridge companies, which is as follows:

> "Section 1351. Any number of persons not less than ten may form a company for the purpose of constructing and maintaining a bridge over any of the streams of water, or any part of such streams which may be within this State, for the public use for the crossing of persons or property according to the provisions of this Article"
>
> (Section 1351, Revised Statues of Mo., 1899),

does not apply to bridges across the Mississippi River, plaintiffs in error saying:

> "It applies by its express terms to the construction of bridges over any of the streams of water, or any part of such streams, which may be within this State", etc.

According to their view, it should be construed to apply to the bridging—

1.

Of streams wholly within the State; or,

2.

To that part of a stream, both of whose banks are in the State, but a part of which stream is also in some other State.

Judge GANTT, in his very able opinion on the first appeal in this case, construes the act as authorizing the construction of bridges over streams forming the boundary lines of a State, like the Mississippi River. He says:

> "For fifty years, at least, our laws have invited and encouraged the incorporation of bridge companies to build bridges over the streams of water in this State, or partly therein, and, under their authority, bridges have been constructed over the Mississippi River",

and he refers to two cases to support this statement:

> Bridge Company v. Shawbacker, 49 Mo. 555;
> Bridge Company v. Ring, 58 Mo. 491.

But it is claimed that the Missouri State Constitution authorizes special legislation on that subject, by including among the exceptions to the enactment of special laws, the following:

> "for the erection of bridges crossing streams which form boundaries between this and any other State",

and, therefore, that any general law which purports to give authority for the incorporating of companies to erect bridges over boundary line streams is violative of that constitutional provision.

It perhaps, ought to suffice to say that the judgment of the Supreme Court of Missouri on that question will, undoubtedly, be the judgment of this Court, whatever opinion this Court may have of the correctness of the views entertained by the State Court which have found expression in the several cases named, but the suggestion of counsel, that it was in the mind of the framers of the Constitution to discriminate against persons who proposed to overcome the great natural barriers to uninterrupted transportation and intercourse between the State of Missouri and other States, is so at variance with other provisions of that instrument and so foreign to the public policy of

the State, that we feel we ought to say that, in our opinion, learned counsel have not given their usual consideration to this particular question, and are doing an injustice to the men who made the Constitution.

The legislature certainly has the power, under the authority referred to, to enact special laws, incorporating bridge companies, although it has never exercised such power; but this can not mean that it has no power to enact a general law which will apply to all companies formed for the purpose of building bridges across

> "streams which form boundaries between this and any other State",

or a general law applying to all bridges to be constructed over any of the waters of the State.

V.

The statute of Missouri confers the right of eminent domain on foreign bridge companies.

Section 1352, R. S. Mo., 1899, confers the right of eminent domain on Missouri corporations. See pages 2–3 of statement.

But it is contended by plaintiffs in error that the law of Missouri does not confer the right of eminent domain on a corporation organized in another State and, therefore, that plaintiff can not maintain this suit.

Section 1024, Revised Statutes of Mo., 1899,

which defendant in error insists confers upon foreign corporations, complying with certain other sections of the statute, as this company did, the same powers possessed by corporations of the State, is as follows:

> "Every corporation for pecuniary profit formed in any other State, territory or country, before it

shall be authorized or permitted to transact business in this State, or to continue business therein if already established, shall have and maintain a public office or place in this State for the transaction of its business, where legal service may be obtained upon it, and where proper books shall be kept to enable such corporation to comply with the constitutional and statutory provisions governing such corporation; and such corporation shall be subjected to all the liabilities, restrictions and duties which are or may be imposed upon corporations of like character organized under the general laws of this State, and shall have no other or greater powers. And no foreign corporation established or maintained in any way for pecuniary profit of its stockholders or members shall engage in any business other than that expressly authorized in its charter, or the law of this State under which it may come, nor shall it hold any real estate for any period longer than six years, except such as may be necessary and proper for carrying on its legitimate business. And no corpoation incorporated under the laws of any other State, territory, or country, doing business in this State, shall be permited to mortgage, pledge or otherwise encumber its real or personal property situated in this State, to the injury or exclusion of any citizen or corporation of this State who is a creditor of such foreign corporation, and no mortgage by any foreign corporation, except railroad and telegraph companies, given to secure any debt created in any other State, shall take effect as against any citizen or corporation of this State, until all of its liabilities due to any person or corporation in this State at the time of recording such mortgage have been paid and extinguished."

This section of the statute was enacted in this State in 1891. The same section first appeared in the Revised Statutes of Illinois of 1872, Chapter 32.

It was construed in two cases before its enactment in Missouri.

> Barnes v. Suddard, 117 Ill. 241;
> Stevens v. Pratt, 101 Ill. 217.

In the latter case the Court said:

> "The language of the last sentence of Section 26, that foreign corporations shall have no greater powers than our domestic corporations, can imply nothing less than they are to have the same powers."

Referring to this section, the Supreme Court of Missouri, in the first opinion in this case, said:

> "In our opinion the statute is susceptible of no other construction, and, having adopted the Illinois statute, we presumably intended to adopt the construction placed upon it when we appropriated it."

But the language of this section was also construed by this Court in the case of

> Christian Union v. Yount (an appeal from the Circuit Court of the United States for the Southern District of Illinois), 101 U. S., *l. c.* 360,

this Court referring to the general statute of Illinois passed in 1872, saying:

> "Section 26 of that general statute expressly recognizes the right of foreign corporations to acquire real estate in Illinois. Its language is 'Foreign corporations and the officers and agents thereof' doing business in this State shall be sub-

jected to all the liabilities, restrictions and duties that are or may be imposed on corporations of like character organized under the general laws of this State, and shall have no other or greater powers.' "

VI.

Plaintiffs in error insist that the laws of Illinois do not confer the Right of Eminent Domain on bridge companies and, therefore, such companies can not exercise that right in Missouri.

It is claimed that the law of Illinois does not confer the right of eminent domain on bridge companies, and that the Southern Illinois & Missouri Bridge Company can not exercise a right or power in Missouri which it can not exercise in Illinois.

On the first hearing, the Supreme Court ruled that the burden of proving the want of authority in the incorporating State rested upon defendants,

(So Ill. & Mo. Bridge Co. v. Stone *et al.*, 174 Mo. *l. c.* 35)

and that in the absence of such proof, it would be presumed that a company with a charter of the State of Illinois, authorizing it to build a specific bridge had a right, under the laws of that State, to do so; or, perhaps we should say that Court refused to recognize the presumption that the foreign State had a different law.

IV Wigmore on Evidence, Sections 2536 and 2573.

Assuming that defendants had the right to reopen this question after it had been closed—after the cause had been remanded—the evidence offered by them was

not sufficient to prove the non-existence of a foreign law.

As shown on

Page 83 of the Transcript of Record,

the defendants offered

Section I, Chapter 32, Revised Stat. of Ill., 1901, which related to the formation of corporations

> "for any lawful purpose, except banking, insurance, real estate, brokerage, the operation of railroads and the business of loaning money",

and providing that corporations formed for the purpose of constructing railroad bridges shall not be held to be railroad corporations.

A section of the Missouri Statute corresponding with the one offered would show no right of condemnation in the corporations to be organized under it, but another statute, as we have seen, does show it.

The Illinois statute in relation to eminent domain, or some other pertinent statute, ought to have been offered, or a witness, learned in the law, who could testify that there was no statute in the State conferring the right of eminent domain on bridge companies, ought to have been produced.

Sections 486, 487, 488, 490, I Greenleaf on Evidence;
I Wigmore on Evidence, Sec. 564;
IV Wigmore on Evidence, Sec. 2556.

That a printed statute book of a sister State is admissible as evidence in the Courts of Missouri, is not denied, but it is not competent for a party to read a section of the statute which does not relate to the par-

ticular matter under investigation, and then insist that he has established such particular fact. Besides, the evidence, if admissible at all, was for the Court to construe, and not for the jury.

IV Wigmore on Evidence, Sec. 2558, and note.

After the first decision of the Supreme Court, it was not competent for either party to introduce evidence on any subject, except the value of the land, and the plaintiff did not offer to do so.

We do not wish to admit, however, that the great State of Illinois has no statute by virtue of which bridges may be built over its navigable waters and land condemned for approaches to such bridges in order that they may be utilized.

But, assuming that the Bridge Company is not vested by the law of Illinois with the right to expropriate property, the condemning of it in Missouri, whose laws authorize it, is not *ultra vires* of a charter which confers the franchise to erect and maintain a bridge spanning the river between the two States.

It will be presumed that the State of Illinois meant to grant to the corporation the right to acquire land for the necessary approaches, and for such terminals as it became necessary for it to employ in the operation of the bridge. The charter could have no ex-territorial effect; it could not empower the company to condemn land in Missouri; the land could only be acquired pursuant to the laws of Missouri, and these authorized the condemnation.

The objection is as to the means resorted to to get the land, and not because of any disability on the part of the company to own and to hold it.

There is no rule of public policy of the State of Illinois violated by permitting the company to employ the remedies afforded to all other like companies by the Courts of Missouri. The company is not prohibited from exercising the right given to it in Missouri; it is rather encouraged to do so in that it is licensed to obtain the land.

Express Co. v. R. R. Co., 91 U. S. 191;
Relfe v. Rundle, 103 U. S. 222;
Taylor on Private Corporations, Secs. 389–390–391;
Reese on Ultra Vires, Secs. 166–167.

VII.

Plaintiffs in Error can not complain that the work was not commenced within twelve months from approval of the Act.

Plaintiffs in error make the point that the right to commence the errection of the bridge structure was limited to one year from the date of the approval of the Act, and that it was not commenced within that period.

It may be that the actual work on the abutments of the bridge was not commenced within the time, but certain necessary and important work—without which the abutments could not have been constructed or the bridge built—was commenced.

Evidence W. E. Angier, engineer, T. of R., p. 22 *et. seq.*

We do not, however, believe that a failure to commence the work within the time, if there had been such failure, could be availed of by plaintiffs in error.

It seems Congress was satisfied with the time in which the work was commenced and with the progress made in the bridge's construction, for, by an Act approved January 18th, 1904, it is provided that

> "Section 13 of the Act entitled 'AN ACT to authorize the construction of a bridge across the Mississippi River at or near Gray's Point, Missouri', be, and the same is, hereby so supplemented and amended as to extend the time for the completion of the construction of the bridge and approaches by said Act authorized, until the 26th day of January, in the year of our Lord 1907".
>
> Public Laws of the United States of America, Passed at the first and second sessions of the 58th Congress, 1903-4, p. 6.

VIII.

The law of Missouri authorizing the construction of bridges is not unconstitutional.

Again it is urged that, if the law of Missouri can be interpreted to authorize the construction of bridges over navigable rivers, which do not lie wholly within the limits of the State, such law is unconstitutional, because it is in conflict with the

> "Federal Constitution and the laws which forbid any State from constructing or authorizing the construction of bridges prior to congressional sanction",

and

> Sec. 9, Chap. 425, U. S. Stat. at Large,

is referred to.

See page 8 of Statement of Defendant in Error for Act of Congress.

The Bridge Company was incorporated in Illinois on the 6th day of December, 1900, and the Act of Congress authorizing the construction of the bridge was approved January 26th, 1901, and it was authorized to do business in the State of Missouri on March 25th, 1902.

Counsel certainly do not mean that there ought to have been a special Act of Congress authorizing the construction of a bridge by a non-existent bridge company. Evidently there was no purpose to construct a bridge without an Act of Congress authorizing it, for, within a month after the Bridge Company was incorporated, it applied to Congress for authority to build it. There was no offending by Missouri, because the admission of the Bridge Company into Missouri to do business was more than a year after the "Federal sanction" had been obtained.

IX.

The Act of Congress and the plans approved by the Secretary of War were to protect the navigation of the river, and did not preclude the company from acquiring necessary lands for terminal purposes.

It may be well to remember that the Southern Illinois & Missouri Bridge Company never undertook to build the bridge under a Federal charter; it has no such charter. It had the authority of Congress to construct a bridge over one of the great, navigable rivers of the country, and this it was required to do in accordance with the Act of Congress and in conformity with plans and specifications which were approved by the War Department.

Congress believed that a bridge, built as required by the Act and under the supervision of the Secretary of War, would reduce the interference with navigation on the Mississippi River to a minimum. Its only concern was to prevent any substantial interference with commerce on the river.

The supervision of the Secretary of War was not confined to the construction of the bridge proper, but extended to the approaches; otherwise, the latter might have been so built as to operate as a dam in times of high water, causing erosion of the banks and a consequent obstruction of the channel.

Plaintiffs in error seem to be of opinion that the Act of Congress took all the life out of the State charter, for they contend that nothing can be done under the company's charter, in the way of providing necessary approaches and terminal yards so that the bridge may be used by the company for the accommodation of traffic.

The 720 feet, where the approach required by the War Department ends, is some sixty feet from the ground. The structure has been extended beyond some 180 or 200 feet to the crest of a bluff, and then the right-of-way crosses over the Stone land to a point beyond where the terminal yards of the company are located.

If it be true that the passage of the Act of Congress deprived the company of all its privileges and powers conferred by the charter and the laws of the two States, then it is a useless structure, representing nothing more than the financial ruin of the Bridge Company.

> "A railroad bridge can be of no use to the public, unless united with necessary appurtenances, such

as approaches, tracks, depots and other facilities, for the public accommodation."

Union Pacific R. R. Co. v. Chicago, Etc., Ry. Co., 163 U. S., *l. c.* 588.

The Court further said:

"It is true that it appears that, from the depot to the point in South Omaha where the tracks of the companies connected, is about four miles, but the scheme of Congress was to accomplish the more perfect connection at or near Council Bluffs, Iowa, and Omaha, Nebraska, and we think this distance reasonable within the terms of the Act, liberally construed, as the Act should be."

Union Pac. R. R. Co. v. Chicago, Etc., Ry. Co., *supra*.

The bridge can not be operated without some kind of terminals. To reach the terminals, it must have railroad tracks, and these tracks must pass over the lands belonging to the plaintiffs in error.

Evidence W. E. Angier, Engineer, T. of R., p. 22.

But there was no purpose on the part of Congress to prescribe the extent of the terminals, except as they were necessary to preserve the navigability of the river, and it had no power to do more. When the company submitted its plans of the bridge and its approaches to the Secretary of War, it did not understand that it was estopped thereby to purchase other ground for its uses or to go into Court and condemn ground that it could not otherwise secure. If plaintiffs in error are right, the Act of Congress and the plans and specifications submitted to the Secretary of War measure all the

rights, the privileges, the powers of the Bridge Company, and the company can only hold on the Missouri side the elevated structure, some 900 feet in length.

If the property can not be subjected to a public use in this proceeding, it must be because the Act of Congress and the acts of the Secretary of War stand in the way, and if they stand in the way of a condemnation suit, then they stand in the way of a voluntary conveyance to the company, for plaintiffs in error say that Congress and the Secretary of War have the right to determine, and have determined just how much ground the Bridge Company is authorized to acquire and hold.

There certainly does not seem to be any Federal question in this case. The only one that bears a resemblance to a Federal question is the one last considered, and that appears to be fictitious.

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